IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.1010 OF 2007

IN

APPEAL (L) NO.101 OF 2007

AND

APPEAL (L) NO.101 OF 2007

IN

CHAMBER SUMMONS NO.1220 OF 2005

IN

SUIT NO.4913 OF 2000

...

Nargis M. Oomerbhoy ...Appellant (orig.Applicant)

v/s.

Majid Ahmedbhai Oommerbhoy ...Respondent (orig.Plaintiff)

And

Rashid Sattar Oomerbhoy and ors. ...Respondents (orig.Defendants)

And

The Court Receiver ...Respondent

...

Mr.E.P.Bharucha i/b Deven Dwarkadas & Partner for the Appellant.

Ms.Kiran Bhagalia with Ms.Deepa Mani & Ms.Tasneem A. Saria i/b S.K.Srivastava & Co. for Respondent No.1.

Mr.Gaurav Joshi i/b Thakore Jariwala & Associates for Respondents.

Ms.Deepali Wahade i/b S.Mohammadbhai & Co. for Respondents Nos. 2, 3, 4(a) and 4(c).

...

CORAM: D.K.DESHMUKH &
J.H.BHATIA, JJ.
DATED: 8TH AUGUST, 2007

P.C.:

1. Assuming that there is sufficient cause shown for condonation of delay in filing the Appeal, we heard the learned counsel appearing for both sides, in detail, on merits of the Appeal.

2. The facts that are material and relevant for deciding this appeal are narrated in detail by the learned single Judge in the impugned order. The court, admittedly, has made an order appointing receiver on the flats, which are subject matter of this appeal, on a prima facie finding that the firm to which the suit relates was a tenant in relation to

those flats. The present Appellant, who is admittedly the wife of the Plaintiff in the suit, who was partner of the firm, took out Notice of Motion No.2509 of 2001. In that Notice of Motion an order was made on 17th October, 2001 whereby the court held, prima facie, that the firm is a tenant of the flats and that as the Appellant claims to be in possession of the flat she can be appointed as agent of the Receiver, if she is willing to be appointed as agent of the Receiver. At the ad-interim stage the court also held that because the Appellant is the owner of the flats, she may not be required to pay any royalty.

. That order was challenged in Appeal, which was Appeal (L) No.1057 of 2001. It was decided on 2-11-2001. The Division Bench recorded its prima facie finding that the firm is a tenant in relation to both flats. The Division Bench clarified that the Receiver is appointed only as a Receiver on the tenancy rights of the flats. The Court also directed that the question of appointment of agent will be decided by the court at the final hearing of the motion.

. That motion was finally decided by order dated 12th July, 2004. The learned single Judge of this court held that the Appellant is to be appointed as agent of the Receiver and the amount of monthly royalty to be paid by her as agent of the Receiver is to be fixed by the Receiver. Against that order an application for review was filed by the Appellant. That Review Application was rejected by order dated 9th September, 2004.

. Against that order and the order passed in Notice of Motion, Appeal No.711 of 2004 was filed. The Division Bench disposed of the Appeal by order dated 7th February, 2005. Perusal of the order of the Division Bench shows that the Division Bench did not disturb the order passed by the learned single Judge appointing the Appellant as agent of the Receiver. The Division Bench also directed that the Receiver can go ahead and fix the royalty. The Division Bench observed that in case the Appellant feels aggrieved by the amount of royalty fixed by the Receiver, she can challenge the same and at that time she can raise an issue about her ownership of the flats. It appears that the Receiver fixed initially ad-hoc amount of royalty, at Rs.10,000/- & Rs.25,000/- in

relation to the two flats.

3. Chamber Summons No.1927 of 2004 was taken out challenging the ad-hoc amount of royalty fixed. That chamber summons was decided by order dated 31-1-2005. The Court did not disturb the order fixing the amount of ad-hoc royalty. The court directed the Receiver to fix the final amount of royalty. The Appellant agreed before the learned single Judge to deposit the ad-hoc amount of royalty. The Appellant was also directed to execute the agency agreement. We are told that agency agreement has been executed by the Appellant. Thereafter, the Receiver fixed the final amount of royalty, which is the same amount which was fixed by him as ad-hoc amount of royalty i.e. Rs.10,000/- & Rs.25,000/- in relation to the two flats.

4. Against that fixation, Chamber Summons No.1220 of 2005 was taken out challenging the amount of royalty fixed by the receiver. The learned single Judge dismissed the Chamber Summons taken out by the Appellant and has confirmed the amount of royalty fixed by the Receiver. The present appeal is filed against that order.

5. The principal submission of the learned Counsel appearing for the Appellant, relying on the judgments which are cited before the learned single Judge and relying on two additional judgments, one in the case of Anthony C. Leo v/s. Nandlal Bal Krishnan and ors, (1996) 11 SCC 376 and other in case of Pradeep C. Mody v/s. Shashikant C. Mody & ors, 1998 (3) Bom.C.R. 823 , is that because the Appellant is also the owner of the two flats she should not be held liable to pay any royalty in her capacity as agent of the Receiver. The same contention was raised before the learned single Judge. The learned single Judge has dealt with that contention in detail and has given reasons elaborately. We are in complete agreement with the reasons given by the learned single Judge. In our opinion, in the proceedings taken out by the Appellant, two positions were clearly held by the court to be established, (i) that, prima facie, firm in relation to which suit has been filed is a tenant of the flats and (ii) that the Appellant is willing to be appointed as agent of the Receiver. Both these findings were challenged before the Appeal Court as also before the Supreme Court by the Appellant. But her challenges have failed.

Therefore, now the Appellant cannot be allowed to argue either that the firm is not a tenant of the flats or that she is not in possession as agent of the Receiver. As the Appellant has been appointed as agent of the Receiver, in our opinion, her status as owner of the flats is not relevant for the purpose of fixation of royalty. For the purpose of fixation of royalty, what is relevant is that she is the agent of the receiver and that for being in possession of the property as agent of the receiver she has to pay royalty. That, apart from being an agent of the receiver, she also is the owner of the property is not relevant so far as the question of fixation of royalty is concerned. As it is, prima facie, found that tenancy of the flats is created in favour of the firm, therefore, it is the firm which can be in possession and not the owner. The royalty is payable by the agent for being allowed to be in possession. As the flats are given to the tenants, as owner she is not entitled to be in possession. As owner she may be entitled to receive rent etc. Therefore, while considering the question what should be the royalty, her status as owner is immaterial. The agent of the Receiver is required to pay royalty, so that the property which is custodio-legis fetches

income for the benefit of the parties to the suit. Tenancy of the two flats, in view of the prima facie finding, is the property of the firm, and therefore, if this finding is ultimately confirmed at the decision of the suit, the partners will be entitled to the tenancy as also the income derived by the firm from the tenancy. It is for this purpose that there is necessity of payment of royalty, and if this is the purpose for which the royalty is to be paid, then the fact that the Appellant who has accepted the agency happens to be the owner, in our opinion, will not be material. She will have to pay royalty as may be fixed by the Receiver to safeguard the interest of the firm.

6. In this view of the matter, therefore, we see no reason to interfere with the order passed by the learned single Judge. Motion & Appeal are, therefore, disposed of.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

upk/-